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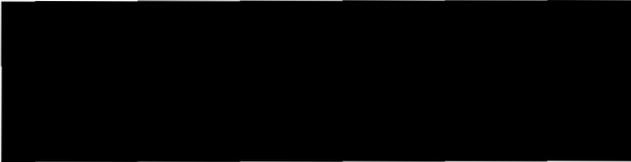
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

U.S. Citizenship
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Services

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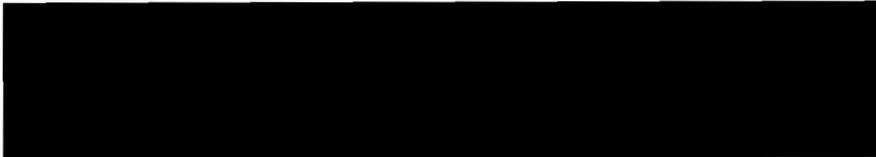
Date: JUN 01 2009

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a firm that provides complete tennis court construction and court equipment sales. It seeks to employ the beneficiary permanently in the United States as a custom woodworker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.¹ The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel contends that the petitioner has demonstrated its ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

In this case, the appeal was filed on July 19, 2007. Counsel for the petitioner indicated on the appeal Form I-290B that she would submit a brief and /or additional evidence to the AAO within 30 days. The AAO sent an inquiry to counsel on April 22, 2009 requesting a copy of such brief or additional evidence. Counsel's response indicated that a brief or evidence in support of the appeal was not filed. Therefore this decision will be rendered on the record as it currently stands.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

¹ The petitioner submitted a copy of the Form ETA 750, but a duplicate original was requested.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the ETA 750A is \$45,000 per year. Part B of the ETA 750, was signed by the beneficiary on two dates. The most recent date is November 4, 2005.³ It indicates that he has worked for the petitioner since January 2001 (to date of signing), however, the petitioner did not submit any evidence of wage payment, W-2 statements, Form(s) 1099 or pay stubs.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on July 6, 2005, it is claimed that the petitioner was established in 1985, claims an annual gross income of

³ The instant beneficiary has been substituted for the original beneficiary. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to United States Citizenship and Immigration Services ("USCIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

\$3,000,000, and currently employs twenty workers.

In support of its continuing financial ability to pay the certified wage of \$45,000 per year, the petitioner provided incomplete copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 1998, 1999, 2000, 2001, 2002, 2003, and 2004. It is noted that none of the designated statements have been attached. Financial information related to 2005 was also omitted. For those reasons alone, the petition is not eligible for approval based on the petitioner's failure to demonstrate a continuing ability to pay the proffered wage through its federal income tax returns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The tax returns indicate that the petitioner uses a standard calendar year to file its taxes. To the extent that the returns reflect the petitioner's financial information containing its net income, current assets, current liabilities and net current assets, that information is set forth below:

	1998	1999	2000	2001
Net Income ⁴ (Form 1120S)	\$25,166	\$23,531	\$51,542	\$ 71,219
Current Assets (Sched. L)	\$ 242,057	\$214,250	\$275,188	\$211,725
Current Liabilities (Sched. L)	\$ 337,715	\$180,277	\$265,182	\$200,336
Net Current Assets ⁵	-\$ 95,658	\$ 33,973	-\$ 10,006	\$ 11,389

⁴ Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. The petitioner's net income is shown on line 21 of its 2001 tax return. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23* (1998-2003) line 17e* (2004) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 1998, 1999, 2000, 2001, 2002, 2003 and 2004, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2002	2003	2004
Net Income (Form 1120S)	-\$249,101	\$199,190	\$ 86,243
Current Assets (Sched. L)	\$204,584	\$354,579	\$221,096
Current Liabilities (Sched. L)	\$520,328	\$289,176	\$351,840
Net Current Assets	-\$315,744	\$ 65,403	-\$ 130,744

As noted in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner additionally supplied a copy of the transmittal letter submitted with the petition which includes an assertion by [REDACTED] the petitioner's president who states that the petitioner's gross income of over \$3,000,000 in 2004 demonstrates its financial ability to pay the proffered wage. The petitioner also provided two letters from its CPA, [REDACTED]. Both letters are dated June 28, 2005. In one letter, [REDACTED] explains that he prepared the petitioner's 2002 tax return and concludes that it was not a profitable year for the petitioner solely due to the September 11, 2001 attacks. He asserts that the petitioner's tax returns filed for 2003 and 2004 show how this was a non-recurring incident. [REDACTED]'s other letter merely states that the depreciation expenses taken in 1998 and 1999 should be added back to net income because they were non-cash expenses.

The director denied the petition on June 18, 2007. The director concluded that the petitioner had not demonstrated that the depreciation expense taken in 1998 and 1999 was not an actual expense to the enterprise. The director also determined that while the petitioner had demonstrated its ability to pay the certified wage in 2000, 2001, 2003 and 2004, but had failed to establish its ability to pay in 1998, 1999 and 2002.

On appeal, counsel does not submit a brief or additional evidence as previously noted. On her notice of appeal, counsel asserts that the USCIS failed to communicate with the petitioner or her and that if prior correspondence was a request for evidence, counsel states that they did not receive an opportunity to respond. Counsel adds that the petitioner has had the ability to pay the proffered wage and points to the accountant's letter discussing the petitioner's financial profile.

The AAO does not find these assertions persuasive. It is noted that the only request for evidence that the director issued was regarding the original labor certification to which counsel

responded. Further, the regulation at 8 C.F.R. § 103.2(b) (8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, “if there is evidence of ineligibility in the record.” The regulation at 8 C.F.R. § 204.5(g) (2) provides that evidence of an ability to pay a certified wage must include either federal tax returns, audited financial statements, or annual reports. As the federal tax returns submitted with the petition failed to establish the petitioner’s ability to pay the proffered wage at the time of filing, the director could reasonably conclude that the evidence was sufficient to render a final decision of ineligibility based on the petitioner’s failure to establish its continuing ability to pay the proffered wage beginning at the priority date. Moreover, 8 C.F.R. § 204.5(g)(2) also allows in appropriate cases, that additional evidence such as bank account records, profit/loss statements, or personnel records may be submitted by the petitioner or requested by the director. Here, the director’s decision was not made until two years after the filing of the petition. If the petitioner had wanted additional evidence to be considered, there was sufficient time to offer it. Further, the petitioner had the opportunity to submit any additional evidence it had of its ability to pay the wage on appeal, but failed to do so.

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner’s net income or net current assets for a given year, then the petitioner’s ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner may have employed the beneficiary, but no evidence of any compensation paid was provided to the record.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986)(citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105 (D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The depreciation deduction will not be included or added back to the net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng Chang* at 536.

As noted above, the accountant's suggestion that the petitioner's depreciation should somehow be added back to its net income is unpersuasive.

It is observed if the copies of federal tax returns were completely provided, instead of the partial copies submitted, then the resulting figures related to the ability to pay may have indicated the following:

In this case, in 1998, neither the petitioner's \$25,166 in net income nor its -\$95,658 in net assets was sufficient to cover the \$45,000 proffered wage and establish its ability to pay in this year.

In 1999, the petitioner reported \$23,531 in net income. Its net current assets were \$33,973. Neither amount is enough to pay the proffered wage in this year. No ability to pay the beneficiary's proposed wage offer was demonstrated.

The petitioner's net income of \$51,542 in 2000; \$71,219 in 2001; \$199,190 in 2003 and \$86,243 in 2004 were sufficient to demonstrate the ability to pay the proffered wage of \$45,000.

As noted above, the accountant merely stated the events of September 11, 2001, accounted for the petitioner's business decline in 2002. A mere broad statement by [REDACTED], cannot by itself, demonstrate the petitioner's ability to pay the proffered wage in 2002. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Matter of Sonogawa is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, as noted above, even if accepting that the 2002 tax year was an anomaly due to the events of September 11th, the petitioner's net income and/or net current assets in 1998 and 1999 were still insufficient to pay the proffered wage. Although the petitioner has had some profitable years, it cannot be concluded that this represents the kind of framework of profitability such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also did not submit any evidence of reputation similar to *Sonogawa*. Moreover as noted above, the tax returns were incomplete and the petitioner failed to provide any financial information relevant to 2005 even though it filed the petition in July 2005.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is January 13, 1998. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the

evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.